APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 93-35746

ST. PAUL FIRE & MARINE INSURANCE COMPANY,
a Minnesota corporation,
Plaintiff-Appellee,

v.

F.H.; K.W.,*
Defendants-Appellants.

Appeal from the United States District Court
for the District of Alaska

Argued and Submitted August 1, 1994

Decided May 26, 1995

Before: PREGERSON, CANBY and BOOCHEVER, Circuit Judges.

CANBY, Circuit Judge:

I

F.H. and her son K.W. appeal a district court order granting St. Paul Fire and Marine Insurance Company summary judgment in this declaratory judgment action. The district court held that an insurance policy St. Paul

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* In the interest of victim privacy, the names of defendants-appellants have been abbreviated to initials throughout this opinion.

issued to Big Brothers and Big Sisters of Alaska (BB/BS) does not provide coverage to BB/BS executive director Kenneth McQuade for damages arising out of McQuade's sexual abuse of K.W. We reverse and remand for further proceedings.

II

From 1979 until late summer or early fall of 1984, McQuade was exectuive director of Big Brothers/Big Sisters in Juneau. His duties included supervision of the program in which volunteer "Big Brothers" and "Big Sisters" acted, as their name implies, as advisors, role models and confidants of boys and girls who qualified as "Little Brothers" or "Little Sisters." McQuade's duties included: interviewing volunteers and children and their parents to determine whether the volunteers and children met the requirements of the program; matching Big and Little Brothers and Sisters; supervising those matches; and interpreting the general program to the community. McQuade first came into contact wtih K.W. because K.W.'s siblings were in the program, and he later matched himself to K.W. as K.W.'s Big Brother. Beginning before that match, and continuing until his arrest in 1986, McQuade sexually abused K.W.

In 1986, F.H. brought a civil action in Alaska Superior Court against BB/BS and McQuade, seeking damages for various compensable injuries sustained by F.H. and K.W. Both BB/BS and McQuade tendered defense of the action to BB/BS's insurance carrier, St. Paul. St. Paul accepted BB/BS's tender, but rejected McQuade's. In 1987, the Alaska Superior Court granted BB/BS's motion for partial summary judgment on the ground that it was not liable under the doctrine of *respondeat superior* for McQuade's acts of sexual abuse. Subsequently, F.H. settled her claims against BB/BS and dismissed BB/BS from the litigation.

F.H. later entered into a settlement agreement with McQuade. Under this agreement, McQuade entered con-

fessed judgments of $969,721.25 and $157,650.13 in favor of K.W. and F.H., respectively, and assigned to them any rights he might have had against St. Paul as a result of his sexual abuse liability. In exchange, K.W. and F.H. agreed not to execute against McQuade on the confessed judgments.[1] Following F.H. and K.W.'s settlement with McQuade. St. Paul filed this declaratory judgment action against F.H. and K.W. in the United States District Court, seeking a declaration that McQuade was not an insured under any St. Paul policy, that St. Paul did not provide coverage to McQuade for acts of sexual abuse, that St. Paul did not owe a duty of defense to McQuade, and that no rights that McQuade transferred to F.H. and K.W. were enforceable against St. Paul. F.H. and K.W. filed a counterclaim seeking a declaration that McQuade's acts of sexual abuse were covered by St. Paul's insurance policies and seeking damages from St. Paul. St. Paul then moved for summary judgment, and F.H. and K.W. filed a cross-motion for summary judgment.

The district court granted summary judgment in favor of St. Paul, reasoning (1) that it is against Alaska's public policy to permit a person to be insured against a claim of sexual abuse, and (2) that although the policy permitted coverage of executive employees where the claim was for a violation of law, the policy did not protect executive employees for non-accidental injuries, particularly where their intentional act causes the injury.

F.H. and K.W. appeal the district court's judgment. They contend that they are entitled to a declaration that St. Paul had a duty to defend and indemnify McQuade under the professional liability policy it sold to BB/BS.

We review *de novo* a district court's grant of summary judgment. *Jesinger v. Nevada Federal Credit Union*, 24

[1] The validity of the settlement agreement has not been raised as an issue on this appeal, and we express no opinion concerning it.

F.3d 1127, 1130 (9th Cir.1994). Viewing the evidence in the light most favorable to the non-moving party, we must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Botefur v. City of Eagle Point*, 7 F.3d 152, 154 (9th Cir. 1993).

III

During the relevant period, St. Paul insured BB/BS under two policies, a general liability policy and a professional liability policy. It is the professional liability policy that is in issue here. That policy contained a section entitled "Who's Protected Under This Agreement." It stated, in pertinent part:

> The named insured shall include any individiual or organization named in the Coverage Summary [*i.e.*, BB/BS]. *It also includes any partner, executive officer, director, stockholder or employee working for you within the scope of their duties.* This policy also includes each volunteer big brother and big sister individually as additional insureds for claims arising from accidental events that were neither expected nor intended by the individual volunteer big brother or big sister and occurring as a result of their activities as volunteer big brothers and big sisters. *There is no coverage for the individual big brother and big sister if the event is in violation of any Federal, State, or Local law. This specific exclusion does not apply to the other insureds named in this agreement.*

(Emphasis added).

St. Paul contends that this provisions are unambiguously intended to exclude coverage of volunteer Big Brothers and Sisters for criminal acts, but to protect BB/BS and its directors and employees from any liability that might accrue to them because of the criminal acts of volunteers. These provisions may indeed have that

effect, but they do not in terms limit themselves to that application. They do not say that employees are protected from liability for criminal acts of *others*. They say that the exclusion for criminal acts does not apply to employees of BB/BS like McQuade. And in this case, unlike the example that forms the basis of St. Paul's argument, McQuade was an employee when he met K.W., interviewed and matched him, and for most of the time that he was K.W.'s Big Brother. By its plain language, the exclusion for criminal acts simply does not apply to McQuade as an employee of BB/BS.

There is no question what kind of criminal acts the parties had in mind when they entered the professional liability insurance agreement. The policy was marketed as part of a special package designed for Big Brother/Big Sister organizations by St. Paul and marketed through its agent Jack L. Kirby. In his memorandum describing the policy, Kirby stated:

> Most of you are aware of the growing number of lawsuits alleging child molesting being brought against the Big Brother/Big Sister agencies and their officers and directors. . . .
>
> * * * *
>
> Professional liability insurance with general liability insurance is the only certain method of insuring against child molesting claims. Regardless of how the suit is filed and what allegations are made, the combination of those two policies will ensure proper coverage.
>
> The insureds in the general liability and professional liability policy are:
>
> 1. The agency.
> 2. The officers and directors.
> 3. The employees of the agency.

> 4. The Big Brother/Big Sister volunteer, but they are not covered for illegal acts. The other insureds *do* have coverage for illegal acts.
>
> * * * *

(Emphasis in original).

In interpreting the policy, we must look both to the policy's language and to Kirby's representations of the policy coverage. *INA Life Ins. Co. v. Brundin*, 533 P.2d 236, 242 (Alaska 1975). From the terms of the policy and the description in Kirby's marketing memorandum, an employee in McQuade's position had every right to expect that he was not excluded from coverage for criminal acts. *See Serradell v. Hartford Accident & Indem. Co.*, 843 P.2d 639, 641 (Alaska 1992) (policy covers if a lay person in a lay interpretation would have reasonably expected it to provide coverage). The policy and the memorandum say as much. There is no exclusion, as there was in *Allstate Ins. Co. v. Roelfs*, 698 F.Supp. 815, 820 (D.Alaska 1987), for liability arising from intentional acts. Quite the contrary, employees are explicitly not excluded from coverage for illegal acts, and it is clear that sexual abuse was the illegal act primarily in contemplation of the parties. Even if there were doubt, the most that could be said is that the policy terms were ambiguous. In that case, they must be construed against the insurer. *U.S. Fire Ins. Co. v. Colver*, 600 P.2d 1, 3 (Alaska 1979); *Bering Strait School Dist. v. RLI Ins. Co.*, 873 P.2d 1292, 1295 (Alaska 1994).

IV

The district court's order was also based on the court's belief that Alaska's public policy would not allow McQuade to be insured for a claim of sexual molestation. In support of this proposition, the court cited *Allstate Ins. Co. v. Roelfs*, 698 F.Supp. at 820-21, n. 6. However, *Roelfs* supports only the proposition that, under Alaska law, where an insurance policy contains an explicit exclu-

sion for bodily injury intentionally caused by an insured, intent to cause injury can be inferred as a matter of law from an act of sexual assault. *Id.* at 820. St. Paul's policy does not contain an exclusion for bodily injury intentionally caused by an insured, and thus *Roelfs* does not apply.

It is true, as St. Paul argues, that Alaska recognizes a general public policy against insuring a person against liability for his or her intentional acts. *See Dairy Queen v. Travelers Indem. Co.*, 748 P.2d 1169, 1172 (Alaska 1988) (principles of public policy deny insured right to recover when he or she intentionally sets fire to property); *see also* Couch on Insurance 2d (Rev. ed.) § 39.15 (1985). To this principle, however, there is an exception that the Alaska courts have not yet addressed. Several courts have held that, when liability insurance is designed to compensate innocent third parties for injuries caused by the intentional misconduct of insureds, it may indemnify without violating public policy. This exception is particularly applicable where it is unlikely that insurance coverage induced the insured to engage in misconduct.

For example, in *Vigilant Ins. Co. v. Kambly*, 114 Mich.App. 683, 319 N.W.2d 382 (1982), a Michigan court of appeals held that a doctor's professional liability insurance policy covered payment of damages to a patient whom the doctor had sexually abused. The court reasoned that "it is unlikely that the insured was induced to engage in the unlawful conduct by reliance upon the insurability of any claims arising therefrom or that allowing insurance coverage here would induce future similar unlawful conduct by practitioners." *Id.* 319 N.W.2d at 385. The prime advantage of coverage is that the innocent victim will be compensated. *See id.*

A number of courts have agreed with the reasoning of *Kambly* and have held that public policy permits innocent victims of insureds' intentional misconduct to be compen-

sated by the insureds' professional liability policies. *See, e.g., St. Paul Fire & Marine Ins. Co. v. Jacobson*, 826 F.Supp. 155, 164-65 (E.D.Va.1993) (public policy does not forbid patients from being compensated by doctor's professional liability policy for doctor's intentional insemination of them with his own sperm), *aff'd*, 48 F.3d 778 (4th Cir.1995); *St. Paul Fire & Marine Ins. Co. v. Shernow*, 222 Conn. 823, 610 A.2d 1281, 1285-86 (1992) (public policy does not prohibit indemnity for compensatory damages flowing from dentist's intentional sexual assault of patient); *St. Paul Fire & Marine Ins. Co. v. Asbury*, 149 Ariz. 565, 720 P.2d 540, 542 (App.1986) (because Arizona public policy favors compensating injured persons, victims of doctor's sexual abuse can be compensated through his professional liability policy).

The reasoning of *Kambly* and its progeny is applicable in this case. St. Paul's policy was clearly designed to compensate victims of sexual abuse, and to indemnify for such liability. It is unlikely that the availability of insurance coverage induced McQuade sexually to abuse K.W. He faced disgrace and severe criminal penalties as illustrated by his conviction and substantial prison sentence. It is equally unlikely that other professionals will be induced to commit sexual abuse if we allow coverage for sexual abuse here. Public policy concerns against allowing McQuade to avoid civil liability by reason of insurance coverage are outweighed by the advantages of assuring that his victim, K.W., will be compensated for the injuries McQuade caused. While no Alaska case addresses compensation of innocent third parties in this specific situation, the Alaska Supreme Court in a different context has permitted insurance to compensate an innocent victim for an injury intentionally caused by an insured. *See Atlas Assurance Co. of America v. Mistic*, 822 P.2d 897, 899-900 (Alaska 1991) (when insured intentionally burned down his own house, innocent coinsured allowed to collect her half of proceeds). We conclude that the Alaska Court would similarly permit com-

pensation of the victims here. Alaska public policy, therefore, does not prohibit K.W. and F.H. from being compensated under the St. Paul policy for injuries caused by McQuade's sexual abuse of K.W.

V

St. Paul argues, however, that even if McQuade is not excluded from coverage because the injuries arose from his own acts of sexual abuse, he still does not qualify under the policy as an insured with regard to those acts. The coverage section of the policy provides that the named insured "includes any . . . executive officer, . . . or employee working for you *within the scope of their duties.*" (Emphasis added). St. Paul argues that sexual abuse cannot possibly have been within the scope of McQuade's duties.

We do not view the scope of duties that narrowly, however. The phrase is not further defined in the policy, and a reasonable insured could expect it to cover him for liability arising out of the functions of his employment, even though the ultimate acts causing injury were personal. Several activities of McQuade led to the injury. He met K.W. in the course of his duties, and the relationship clearly began as a result of McQuade's exercise of his duties as executive director of BB/BS. He interviewed K.W. and was responsible for placing him in a Big Brother-Little Brother relationship. McQuade certainly had a duty within the scope of his employment to place K.W. with someone other than a pedophile. He also had a duty to screen potential Big Brothers. The fact that McQuade placed K.W. with himself was a cause of the abuse that followed. Indeed, even acting as a Big Brother easily fits within the scope of McQuade's duties. One of his explicit functions as executive director was to interpret the BB/BS program to the community. It hardly exceeds the scope of that duty for McQuade to be an example and serve as a Big Brother himself. And his

duty in that Big Brother relationship is to guide and nurture K.W., not to abuse him. Thus there were several failures of McQuade, committed in the scope of his employment, that acted as causes of the abuse of K.W.

St. Paul argues that the third amended complaint of F.H. and K.W. is a transparent attempt to allege negligent failure of employment duties when the real damages was intentional. But this fact does not alter the analysis. There is no exclusion in the policy from coverage for intentional acts. There is an exclusion for criminal acts, but employees like McQuade are explicitly excepted from that exclusion. One reasonable gloss that an insured may put on that exception for employees is that there must be some criminal acts committed in the scope of their employment duties for which the employees are covered. Thus the fact that McQuade's failures properly to place K.W., to supervise that placement, to screen K.W.'s Big Brother, and to guide K.W. as a Little Brother, were intentional does not operate to exclude them from coverage.

We conclude, therefore, that McQuade committed several acts within the scope of his employment that caused the ultimate abuse of K.W. Those acts fell within the coverage specified by the policy for employees of BB/BS, and were not excluded by the clause relating to criminal acts.

VI

Finally, St. Paul argues that F.H. and K.W. are collaterally estopped by a ruling of the Alaska Superior Court from arguing that McQuade's acts of sexual abuse occurred within the scope of his duties as executive director of BB/BS. The ruling in question is the Superior Court's partial summary judgment in favor of BB/BS, holding that BB/BS was not liable to F.H. and K.W. on a theory of *respondeat superior.*

We conclude that F.H. and K.W. are not collaterally estopped. The partial summary judgment was not a final judgment. As a partial summary judgment, it could not

have been appealed by F.H. and K.W. when it was entered. It was subject to reconsideration on proper motion. Alaska Civil Rule 54(b). The partial summary judgment, of course, would have become a final and appealable order if the litigation had gone to final judgment, but settlement intervened. We cannot say that the ruling was "'sufficiently firm to be accorded conclusive effect.'" *Briggs v. State Dep't of Public Safety*, 732 P.2d 1078, 1082 (Alaska 1987) (*quoting* Restatement (Second) of Judgments § 13 (1982)). We do not view the partial summary judgment on the same plane with the exhaustive decision, after full trial, given collateral estoppel effect in *Borg-Warner v. Avco Corp.*, 850 P.2d 628 (Alaska 1993). *Borg-Warner* relied on *Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1190-92 (5th Cir.1982), another fully-tried case in which the court gave effect to the judgment despite the fact that the ministerial act of entry had not occurred. The Superior Court's ruling in this case never approached that stage. The court could, on its own initiative, revise the order at any time before judgment.[2]

We conclude, therefore, that F.H. and K.W. are not collaterally estopped from asserting that McQuade's actions within the scope of his duties as executive director of BB/BS caused their compensable injuries.

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[2] *See also Luben Industries, Inc. v. United States*, 707 F.2d 1037, 1040 (9th Cir.1983) (district court did not abuse its discretion in determining that non-appealable interlocutory opinion that was subject to revision upon proper motion did not have collateral estoppel effect); *Avondale Shipyards, Inc. v. Insured Lloyd's*, 786 F.2d 1265, 1269-72 (5th Cir.1986) (interlocutory order granting partial summary judgment that was non-appealable and subject to revision did not have collateral estoppel effect); *Aetna Casualty & Surety Co. v. Fairchild*, 620 F.Supp. 1245, 1249 (D.C.Idaho 1985) (because a state court's entry of partial summary judgment is open to review and non-appealable, it does not have collateral estoppel effect).

VII

Because BB/BS's professional liability policy may be construed by a reasonable insured to create an expectation that it provides coverage for claims arising from McQuade's sexual abuse of K.W., we conclude that it does provide such coverage. We also hold that Alaska public policy does not prohibit that coverage in the circumstances of this case. St. Paul had a duty to defend and indemnify McQuade under the circumstances of this case. We therefor reverse the district court's summary judgment in favor of St. Paul, and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B

[Filed Jul. 15, 1993]

MINUTES OF THE UNITED STATES DISTRICT COURT DISTRICT OF ALASKA

Case No. A90-042 Civ.

ST. PAUL FIRE AND MARINE INS. CO.

v.

FRANCES HOUSTON, *et al.*

By: THE HONORABLE JAMES K. SINGLETON

Deputy Clerk: Marvel Hansbraugh, Case Management: 271-5575 *

PROCEEDINGS: ORDER FROM CHAMBERS

This is an action for declaratory judgment. 28 U.S.C. § 2201. Jurisdiction is based upon diversity of citizenship. 28 U.S.C. § 1332. In this action the insurer seeks a declaration that its policy issued to Big Brothers and Big Sisters of Alaska, Inc., does not cover Kenneth McQuade as an additional insured against claims made against McQuade by Frances Houston for the sexual abuse of her son.[1] McQuade seeks coverage both as the

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[1] The Ninth Circuit has expressed concern about the federal district court's hearing declaratory judgment actions in insurance cases during the pendency of state court proceedings in which the coverage and policy issues could be decided. *See Continental Casu-*

assigned volunteer Big Brother and as a supervisory paid employee who participated in the decision to assign himself to the Houstons as a Big Brother for Kenneth Woodbury, Houston's son. The parties filed cross-motions for summary judgment. I felt that Alaska law was unclear on the issue of coverage and attempted certification of certain issues to the Alaska Supreme Court pursuant to Alaska Rule of Appellate Procedure 407. The Supreme Court declined to respond to these issues. The case is therefore before me again for further action. (*See* my Order at Docket No. 97.) I have thoroughly reviewed the record in this case and conclude that I should follow a decision by Judge James F. Fitzgerald of this Court in which he predicted that the Alaska Supreme Court, when faced with similar issues, would find that it is against Alaska's public policy to permit a person to be insured against a claim of sexual abuse. *See Allstate Ins. Co. v. Roelfs*, 698 F. Supp. 815, 820-21 & n.6 (D. Alaska 1987) (intent to cause injury inferred as a matter of law from sexual abuse without regard to insured's subjective intent).[2] Judge Fitzgerald's decision is directly applicable to McQuade's attempt to assert coverage as a volunteer Big Brother. It is true that the policy is expressly written to permit coverage of executive employees or supervisory employees where the claim was for a violation of law. The policy does not, however, protect supervisory employ-

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alty Co. v. Robsac Industries, 947 F.2d 1367 (9th Cir. 1991); *see also American Economy Ins. Co. v. Williams*, 805 F. Supp. 859 (D. Idaho 1992). There are no state cases pending in this matter at this time. The only state action settled. The Alaska Supreme Court has declined to accept certification of the coverage issue. Under these circumstances, this Court must resolve them. *See, e.g., Chamberlain v. Allstate Ins. Co.*, 931 F.2d 1361 (9th Cir. 1991).

[2] It is possible that the Alaska Supreme Court considered *Roelfs* when it decided that Alaska law was sufficiently clear on the certified issues that further elucidation was not required. Even if this was not the Alaska Supreme Court's view, consistency in this District is probably warranted in the absence of some basis for believing the Alaska Supreme Court would reach a contrary decision.

ees for non-accidental injuries, particularly where it is the supervisory employee's intentional act which causes the injury. Thus, *Roelfs* would appear to be dispositive of the claim under the paid employee coverage provision as well as the provision covering volunteers.

IT IS THEREFORE ORDERED:

The motion of St. Paul Fire and Marine Insurance Company for summary judgment as Docket No. 37 is GRANTED. The cross-motion of Frances Houston for summary judgment at Docket No. 38 is DENIED. The Clerk is directed to enter judgment in favor of St. Paul and against Houston, declaring that St. Paul's policy issued to Big Brothers and Big Sisters of Alaska does not provide coverage to Kenneth McQuade for damages arising out of his sexual abuse of Kenneth Woodbury.

Entered at the direction of the Honorable James K. Singleton, United States District Court Judge, by Ardel Burritt, secretary to Judge Singleton.

DATE: July 14, 1993 Secretary's Initial: ab

* ALL INQUIRIES REGARDING THE SCHEDULING OR CALENDARING OF THIS CASE SHOULD BE DIRECTED TO THE ABOVE-INDICATED CASE MANAGER.

C.F. No. 1

APPENDIX C

[Filed October 22, 1992]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

Case No. A90-0042 Civil

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Plaintiff,

vs.

FRANCES HOUSTON and KENNETH WOODBURY,
Defendants.

ORDER FOR CERTIFICATION OF DETERMINATIVE QUESTIONS OF STATE LAW PURSUANT TO RULE 407 OF THE ALASKA RULES OF APPELLATE PROCEDURE

This insurance coverage declaratory judgment action arises out of alleged criminal and tortious acts committed by Kenneth McQuade, an employee and volunteer with plaintiff's insured Big Brothers/Big Sisters of Juneau, against defendant Kenneth Woodbury, a minor client of Big Brothers/Big Sisters. The question in this declaratory judgment action is whether St. Paul incorrectly determined that McQuade's actions were not within the coverage provided by the policy, and if so, what follows from that error.

It appearing that there are involved in this proceeding questions of Alaska law which are determinative of the liability of plaintiff St. Paul, and as to which there appear to be no controlling precedents in the decisions of the Alaska Supreme Court, the court invokes Rule 407 of the Alaska Rules of Appellate Procedure and hereby certifies the following questions of Alaska law to the Alaska Supreme Court:

1. Under the rule of *Doe v. Samaritan Counseling Center*, 791 P.2d 344 (Alaska 1990), and con-

sistent with Alaska public policy, are the actions of Kenneth McQuade within the scope of his duties of employment and thus covered by the insurance coverage provided to Big Brothers/Big Sisters of Juneau by St. Paul?

2. What is the effect, if any, of the intervening decision of *Doe v. Samaritan Counseling Center* upon the collateral effect of Judge Jahnke's prior ruling in favor of Big Brothers/Big Sisters on that entity's respondeat superior liability for the actions of Kenneth McQuade, and the implicit ruling that McQuade's actions were not "within the scope of his duties" as that phrase is used to demarcate coverage in the policy?

In addition, St. Paul Fire and Marine Insurance Company (St. Paul) requests that the Alaska Supreme Court consider the public policy implications of permitting an insured to recover from his insurance company damages assessed as a result of that person's criminal acts. St. Paul reasons that such a ruling would contravene public policy by encouraging people to commit criminal acts. On the other hand, defendants argue that the insurance policy speaks for itself in determining the extent of coverage. We are aware of no Alaska Supreme Court case addressing this issue directly. The closest case we have found is *Providence Washington Ins. Co. v. City of Valdez*, 684 P.2d 861, 863 (Alaska 1984), in which the court held that under certain circumstances, an insurer can be held liable for punitive damages assessed against an insured. *See also LeDoux v. Continental Ins. Co.*, 666 F. Supp. 178 (D. Alaska 1987). Therefore, we request that the court also consider this issue.

STATEMENT OF RELEVANT FACTS

Kenneth McQuade (McQuade), while employed by an insured of St. Paul Fire and Marine Insurance Company (St. Paul), Big Brothers/Big Sisters of Juneau (Big Brothers), as its executive director, engaged in repeated

acts of sexual abuse of Kenneth Woodbury (Woodbury), the minor child of Frances Houston (Houston), over a period of time beginning in the summer of 1983 and ending with his arrest for sexual abuse of a minor on March 29, 1986. Houston, individually and as parent of Woodbury, filed a civil action in Superior Court in Juneau alleging that Big Brothers and McQuade breached certain duties owed to plaintiffs and that, as a result of such breach, plaintiffs incurred compensatory damages, costs, and attorneys' fees and that plaintiffs were entitled to an award of punitive damages.[1] In plaintiffs' Third Amended Complaint, plaintiffs alleged that McQuade had a duty not to take advantage of his professional relationship with the plaintiffs, that he had a duty to enforce the policies and procedures of Big Brothers and to ensure that its staff followed these policies and procedures, that he had a duty to disclose his sexual orientation, the fact that he was sexually attracted to young males, and that his match as a big brother to Woodbury was contrary to the agency's policies and procedures. Plaintiffs alleged that McQuade breached these duties negligently, carelessly, and intentionally, and as a result of his conduct, plaintiffs suffered the injuries alleged in the complaint.

McQuade entered into an agreement with Woodbury, now emancipated, and Houston in settlement of all their claims against him. The parties also entered into a Stipulated Covenant Not to Execute and McQuade assigned to plaintiffs any and all claims which he might have against various insurance carriers, adjusters, or brokers as a result of the civil litigation instituted by the plaintiffs against him. He confessed judgment on the claim of Woodbury in the total amount of $969,721.25, which confession of judgment was entered by the Clerk of the Court on January 24, 1990. He also confessed judgment

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[1] This action was entitled *Frances Houston, individually and as parent of Kenneth Woodbury v. Kenneth McQuade*, Case No. 1U-86-2464 Civil. The trial court granted Big Brothers' motion for partial summary judgment on the issue of *respondeat superior* on October 2, 1987. The claims by Houston and Woodbury against Big Brothers were subsequently settled.

in favor of Frances Houston, individually, in the amount of $157,650.18, which was also entered by the Clerk of Court on January 24, 1990.

It is uncontroverted that McQuade sexually abused Woodbury beginning in the summer of 1983 and ending sometime just prior to his arrest in March of 1986. It is also uncontroverted that McQuade interacted appropriately with Woodbury, (i.e., supervised his earlier match with a Big Brother, had contact with his other family members as part of the process of supervising that match and matches with his siblings), for years prior to the summer of 1983. McQuade has testified that he first became sexually attracted in Woodbury in the summer of 1983 and thereafter made arrangements to be Woodbury's big brother, and that he had sexual contact with Woodbury once every week to two weeks during the beginning of the summer of 1983 and that this contact included oral, genital, and digital contact.

As executive director, McQuade was responsible for the operation of the entire program. He oversaw the assignment of Kenneth Woodbury as his little brother, in a process in which there were significant deviations from established Big Brothers policy. Pre-match screening of volunteers was required by the organization's policies and procedures, and those same policies required that full and frank disclosure of the volunteer's sexual preferences be made at a pre-match meeting with the parent of the prospective little brother. McQuade conceded in his deposition that he engaged in homosexual activity before the match with Woodbury. He further conceded that no disclosure of this was made to Frances Houston. McQuade used his position as Executive Director to gain access to Woodbury, to prepare him for sexual abuse, and to manipulate the case worker, Marilyn Irwin, into permitting Woodbury to be matched with McQuade.

Marilyn Irwin was employed by Big Brothers to screen applicants and volunteers for the program. She first learned of McQuade's homosexual activities in 1981, and never disclosed to Francis Houston that McQuade had

managed to avoid through the program's screening process. Marilyn Irwin felt powerless to intervene on behalf of Kenneth Woodbury, though it was her job to do so, because of McQuade's supervisory position and personal and professional influence over her.

McQuade was charged with violations of A.S. § 11.41.434(a)(1) (sexual abuse of a minor in the first degree) (six counts), A.S. § 11.41.436(a)(1) (sexual abuse of a minor in the second degree) (one count), and A.S. § 11.41.438 (sexual abuse of a minor in the third degree) (one count) He entered a plea of *nolo contendere* and was convicted of two counts of sexual abuse of a minor in the first degree, one count of sexual abuse of a minor in the second degree, and two counts of sexual abuse of a minor in the third degree.

Big Brothers was insured during the period of Woodbury's abuse by McQuade by the St. Paul Fire and Marine Insurance Company under a professional office package which included a professional liability policy and a general liability policy. St. Paul's policies provided for coverage for volunteers of the Big Brothers program for "accidental events that were neither expected nor intended by the individual volunteer big brother." Under the terms of the Professional Liability Protection portion of St. Paul's policy, there was no coverage for volunteer Big Brothers if the event which gave rise to the question of coverage was a violation of any state, federal, or local law. The policy provides that the "specific exclusion of violations of law does not apply to the other insureds named in this agreement." Other insureds include any partner, executive officer, director, stockholder, or employee working for Big Brothers/Big Sisters "within the scope of their duties."

In a letter dated February 24, 1987, St. Paul denied coverage to McQuade for any liability arising out of his sexual abuse of Woodbury and also declined to provide a defense to him in the civil actions pending against him. This declaratory judgment action was filed requesting that the court determine that St. Paul owed neither

a duty to indemnify nor a duty to defend McQuade under the policies.

THE INSURANCE POLICY LANGUAGE

Big Brother purchased a package of insurance coverage from St. Paul. The package included "Professional Liability Protection for Agencies of the Big Brothers/Big Sisters of America" ("Policy"). In relevant part the Policy states:

> What This Agreement Covers
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> This agreement provides coverage for professional liability claims brought against you—the person or organization named under "insured" above. To be covered claims must be based on events that happen while this agreement is in effect. We'll pay amounts you're legally required to pay for damages resulting from injury caused by your activities as a Big Brother/Big Sister of America Agency including:
>
> * Professional services that you provided or should have provided.
>
> * Professional services and other services necessary an incidental to the operation of your agency that we were should have been provided by anyone for whose acts you're legally responsible but not limited to services of volunteer big brothers and big sisters.
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> What do we mean by injury? Whenever we use just the word injury we mean that both bodily injury and personal injury.
>
> What do we mean by bodily injury? Any battery, physical injury, sickness, disease or death, including damages for care and loss of services and any mental anguish including emotional or psychological distress.
>
> . . .
>
> Defending Lawsuits. We'll defend any suit brought against you for damages covered under this agreement, even if the suit is groundless or fraudulent.
>
> . . .

Who's Protected Under This Agreement

The named insured shall include any individual or organization named in the Coverage Summary. It also includes any partner, executive officer, director, stockholder or employee working for you within the scope of their duties.

This policy also includes each volunteer big brother and big sister individually as additional insureds for claims arising from accidental events that were neither expected nor intended by the individual volunteer big brother or big sister and occurring as a result of their activities as volunteer big brothers and big sisters. There is no coverage for the individual big brother and big sister if the event is in violation of any Federal, State, or Local law. This specific exclusion of violations of law does not apply to other insured named in this agreement.

This policy was in effect at all times relevant to this lawsuit.

NATURE OF THE CONTROVERSY

The controversy in this case is whether McQuade's actions to facilitate the abuse, taken by him in his capacity as Executive Director, are covered by the policy language which exempts executive officers of Big Brothers from the exclusion, applicable to volunteer insureds, barring coverage for criminal acts. The sexual abuse of Woodbury occurred both before and after he was matched with McQuade.

If the criminal actions by McQuade in his capacity as Executive Director were insured by the policy, then the question is presented whether such actions are insurable under Alaska public policy. If the answer to this question is "yes," then it must be determined what follows from the breach of St. Paul's duty to defend and indemnify. Even if the criminal actions by McQuade were uninsurable, the failure of St. Paul to defend under a reservation of rights prior to successfully obtaining a declaratory judgment may constitute a breach of the duty to

defend. The Alaska Supreme Court's insistence upon, or at least strong recommendation of, insurers' resort to declaratory judgment actions to protect themselves is suggested by the opinion of the Court in *Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin*, 828 P.2d 745, 768 n.58 (Alaska 1992).

DISCUSSION OF RELEVANT PRECEDENTS

In *Doe v. Samaritan Counseling Center*, 791 P.2d 344 (Alaska 1990), the Alaska Supreme Court rejected traditional tests for *respondeat superior* liability in favor of a multifactored fact-sensitive analysis in which the "motvation to serve" is not a prerequisite of liability but merely probative of it. The rule announced in *Doe v. Samaritan Counseling Center* is that "where tortious conduct arises out of and is reasonably incidental to the employee's legitimate work activities, the 'motivation to serve' test will have been satisfied." The Supreme Court concluded in *Doe* that "[g]iven the transference phenomenon that is alleged to have occurred in this case, we hold that it could reasonably be concluded that the resulting sexual conduct was 'incidental' to the therapy." This was so even though the appropriate manner of therapy, even when effected through transference, has no tolerance for sexual conduct between therapist and patient. Rather, transeference is a heightened level of trust between patient and therapist which echoes the relationship between the patient and his or her parents at a young and trusting age.

If no transference phenomenon is found to have occurred in this case, and *Doe* is extended to cases in which there is no transference phenomenon but rather a highly developed trust relationship between a vulnerable person and a predator, then *Doe* might be controlling. If, instead, no transference is found and *Doe* is held to be limited to cases in which a transference phenomenon place,[2] *respondeat superior* liability will not attach to Big

[2] The basis for this suggestion is the *Doe* Court's quotation of the following language from *Simmons v. United States*, 805 F.2d

Brothers for the actions of McQuade. If *respondeat superior* liability does attach, then *a fortiori* McQuade's actions were within the scope of his duties, rendering McQuade an insured under the definition of insureds in the Professional Liability Policy. As an insured who is not a volunteer, the exclusion for criminal acts would not apply, unless such coverage is barred by Alaska public policy. This analysis equates "within the scope of their duties," the phrase used in the insurance policy, with "within the scope of their employment," the typical phrasing of the scope of *respondeat superior* liability. There appears to be no good reason to conclude that one is broader or narrower than the other. *Cf. Horace Mann Ins. Co. v. Analisa N.*, 214 Cal. App.3d 850, 263 Cal. Rptr. 61, 63 (Cal. App. 4th Dist. 1989) (not distinguishing between two "scopes" because lay person would not).

1363 (9th Cir. 1986): "[t]he centrality of transference to therapy renders it impossible to separate an abuse of transference from the treatment itself. The district court correctly found that the abuse of transference occurred within the scope of Mr. Kammer's employment." *Simmons*, 805 F.2d 1363, 1370 (9th Cir. 1986) (quoted in *Doe*, 791 P.2d at 348). The *Doe* Court continued, "[g]iven the transference phenomenon that is alleged to have occurred in this case, we hold that it could reasonably be concluded that the resulting sexual conduct was 'incidental' to the therapy." *Doe*, 791 P.2d at 348.

Other jurisdictions considering *respondeat superior* claims have generally rejected the proposition that sexual abuse is within the scope of employment, declining to relax the *respondeat superior* test until it is a mere forseeability inquiry. *See, e.g., John R. v. Oakland Unified School Dist.*, 48 Cal.3d 438, 256 Cal. Rptr. 766, 769 P.2d 948 (Cal. 1989); *Horace Mann Ins. Co. v. Analisa N.*, 214 Cal. App.3d 850, 263 Cal. Rptr. 61 (Cal. App. 4th Dist. 1989); *Bozarth v. Harper Creek Bd. of Educ.*, 94 Mich. App. 351, 288 N.W.2d 424 (Mich. App. 1979); *Boykin v. Dist. of Columbia*, 484 A.2d 560 (D.C. Cir. 1984). *Cf. Ciarochi v. Boy Scouts of America*, Case No. 1KE-89-42 Civil (Jahnke, J.) (August 6, 1990) (limiting *Doe* to transference cases); *cf. also* Note, *Bad Samaritans Make Dangerous Precedent: The Perils of Holding an Employer Liable for an Employee's Sexual Misconduct*, VIII Alaska L. Rev. 181 (June 1991) (analysis highly critical of *Doe* decision).

If *Doe* is deemed relevant to these legal questions, then the collateral estoppel effect of Judge Jahnke's rulings in Big Brothers' favor on *respondeat superior* liability would be undermined. This is because changes in the law can make the doctrine of collateral estoppel inapplicable. *Cf. State v. Baker*, 393 P.2d 893, 898 & n.27 (Alaska 1964) ("The [United States Supreme] Court then proceeded to note certain limitations on the doctrine of collateral estoppel, as, for example, where supervening decisions of its own or of the state courts so change the legal atmosphere as to render the doctrine inapplicable. In such a situation, the Court said, 'the supervening decision cannot justly be ignored by blind reliance upon the rule of collateral estoppel.' "); *Ferguson v. Department of Corrections*, 816 P.2d 134, 139 n.11 (Alaska 1991) (quoting *Baker*). While the fact of settlement precludes the reassertion by defendants in this action of a claim against Big Brothers, the guidance from the Supreme Court will be material to the determination whether St. Paul's properly refused to indemnify or defend its insured.

IT IS THEREFORE ORDERED:

That the determinative questions of law given above be respectfully certified to the Alaska Supreme Court pursuant to Rule 407 of the Alaska Rules of Appellate Procedure.

DATED at Anchorage, Alaska this 21 day of October, 1992.

/s/ James K. Singleton
HONORABLE JAMES K. SINGLETON, JR.
United States District Court Judge

APPENDIX D

THE APPELLATE COURT OF ALASKA

Supreme Court Case #55394

ST. PAUL FIRE

v.

HOUSTON

ORDER

02/10/93

On consideration of the questions certified by the United States District Court for the District of Alaska on October 22, 1992. IT IS ORDERED: The Alaska Supreme Court declines to answer the questions certified to it. Entered by direction of the court on February 5, 1993. USDC# A90-042CI. cc: Justices, Judge Singleton.

Clerk of The Appellate Courts

APPENDIX E

[Filed Jul. 13, 1995]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 93-35746
DC No. CV-90-00042-JKS

ST. PAUL FIRE & MARINE INSURANCE COMPANY,
a Minnesota corporation,
Plaintiff-Appellee,

v.

F.H.; K.W.,*
Defendants-Appellants.

ORDER

BEFORE: PREGERSON, CANBY and BOOCHEVER,
Circuit Judges

The panel has voted unanimously to deny appellee's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* In the interest of victim privacy, the names of defendants-appellants have been abbreviated to initials throughout this opinion.

APPENDIX F

[Filed Oct. 2, 1987]

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

No. 1JU-86-2464 Civil

FRANCIS HOUSTON, individually, and as Parent of KENNETH WOODBURY,

Plaintiff,

v.

KENNETH MCQUADE and BIG BROTHERS/BIG SISTERS OF JUNEAU, INC.,

Defendants.

MEMORANDUM AND ORDER

Having reviewed the record and heard oral argument, for the reasons set forth in Big Brothers/Big Sisters memoranda regarding *respondeat superior,*

IT IS ORDERED that Big Brothers/Big Sisters' motion for partial summary judgment on *respondeat superior* is granted. *See also Boykin v. District of Columbia,* 484 A.2d 560 (D.C. 1984); *Nazareth v. Herndon Ambulance Service,* 467 So. 2d 1076 (Fla. App. 1985); *pet. for rev. den.* 478 S. 2d 53 (Fla. 1985); and *Bozarth v. Harper Creek Board of Education,* 288 N.W. 2d 424 (Mich. App. 1979).

DATED: October 2, 1987.

/s/ Thomas M. Jahnke
THOMAS M. JAHNKE
Superior Court Judge

APPENDIX G

[Filed May 11, 1989]

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

Case No. 1JU-86-2464 Civil

FRANCES HOUSTON, individually and
as Parent of KENNETH WOODBURY,
Plaintiff,

v.

KENNETH MCQUADE and BIG BROTHERS/
BIG SISTERS OF JUNEAU, INC.,
Defendants.

DISMISSAL

This matter as to all claims against Big Brothers Big Sisters of Juneau, Inc., is hereby dismissed with prejudice. Each party is to bear their own costs and attorney fees.

The counterclaim entered by Big Brothers/Big Sisters of Juneau, Inc., against Frances Houston is hereby dismissed with prejudice. Each party is to bear their own costs and attorney fees.

Dated 5/11/89

/s/ Thomas M. Jahnke
JUDGE THOMAS M. JAHNKE

APPENDIX H

[Filed Aug. 6, 1990]

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT KETCHIKAN

No. 1KE-89-2-42 CI

DAVID ("MICKY") CIAROCHI, a minor, and TONYA CIAROCHI, individually, and as parent and guardian of David Ciarochi,

Plaintiffs,

vs.

THE BOY SCOUTS OF AMERICA, INC., THE BOY SCOUTS OF AMERICA WESTERN REGION, INC., THE SOUTHEAST ALASKA COUNCIL, INC., and DUANE SINCLAIR,

Defendants.

MEMORANDUM OF DECISION AND ORDER RE: VICARIOUS LIABILITY

The matter before the court is the resolution of cross motions brought by the Ciacrochis on the one hand and the Boy Scouts of America, Inc. (BSA) and the Southeast Alaska Council, Inc. (Southeast Council) on the other hand on issues of vicarious liability. In the alternative, the Ciarochis ask that the court state the law of the case regarding the issues of vicarious liability.

I. INTRODUCTION

When this case arose, Micky Ciarochi was a Cub Scout. Though he was only 10 years of age, too young to join the Boy Scouts, he was attending Boy Scout meetings and activities supervised by defendant Duane Sin-

clair, the duly appointed scoutmaster of Troop 14 in Ketchikan.

On March 3, 1988, Sinclair gave Micky a ride home from a scout function. They were parked in front of Micky's house when passersby observed Sinclair committing an act of sexual abuse against Micky. Apparently, this was not the first occasion of sexual abuse; Sinclair had been abusing Micky for approximately a year. Ultimately, Sinclair was charged with sexual abuse of a minor, entered a plea of no contest, and was convicted based upon that plea.

The Ciarochis have brought a motion for partial summary judgment asking the court to hold BSA vicariously liable as a matter of law for any harm caused to the Ciarochis by defendant Sinclair.[1] They would premise liability on any one of several sections of the *Restatement (Second) of Agency*, including § 267 (liability for lack of care and skill of an apparent agent); § 219(2)(d) (liability for torts of servants acting outside scope of employment if servant was aided in accomplishing tort by the existence of agency relation); § 261 (liability for an agent apparently acting within his authority to commit a fraud); and § 265 (liability for torts committed by an apparent agent).

BSA and the Southeast Council seek partial summary judgment declaring that BSA and Southeast Council are not vicariously liable for the alleged sexual misconduct of Sinclair.

There are multiple factual disputes asserted in the briefing concerning the existence and scope of any agency relationship or apparent agency relationship. Those disputes, in the main, are not material to the analysis.

The analysis which follows has five subsections. Subsection A is a brief discussion of summary judgment

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[1] The liability the Ciarochis would impose on BSA is *contingent*; their motion does not purport to establish that Sinclair abused Micky, only that BSA is liable *if* Sinclair abused Micky. Thus, Sinclair's interests are not adjudicated in this decision.

standards. Subsections B through D discuss applications of vicarious liability under specific sections of the *Restatement (Second) of Agency*. Subsection E proceeds beyond the specific applications to a discussion of broader principles and policies which underlie the imposition of vicarious liability in court decisions. In effect, subsection E subsumes subsections B-D; however, analyses of those specific applications are included since the parties focused so sharply on them.

II. ANALYSIS

A. *Summary Judgment Standards*

These motions are brought under A.R.Civ.P. 56. The rule is designed to allow a party to show that there are no *factual* disputes regarding a claim, thereby allowing the court to resolve the legal issues and enter judgment without trial in accordance with the undisputed facts and the applicable law. Before a party may have summary judgment or partial summary judgment, it must appear that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." A.R.Civ.P. 56(c). If there *is* a genuine issue of material fact, the dispute must await resolution at trial.

In the case at bar, there are cross-motions for partial summary judgment on the same issues. However, that posture of the case does not assure that the issues are proper ones for resolution by partial summary judgment. As one authority has noted:

> The third reason that cross-motions must be considered separately and should not be interpreted necessarily to mean that judgment should be entered on one of them is that each party, as a movant for summary judgment, bears the burden of establishing that no genuine issue of material fact exists and that he is entitled to a judgment as a matter of law. The fact that one party fails to satisfy that burden

> on his own Rule 56 motion does not automatically indicate that the opposing party has satisfied his burden and should be granted summary judgment on the other motion. The court must rule on each party's motion on an individual and separate basis, determining, in each case, whether a judgment may be entered in accordance with the Rule 56 standard. Both motions must be denied if the court finds that there is a genuine issue of material fact. But if there is no genuine issue and one or the other party is entitled to prevail as a matter of law, the court will render judgment.

10A C. Wright, A. Miller, and K. Graham, *Federal Practices and Procedure* § 2720 (1983).

B. *Liability Under Sections 265 and 267*

Restatement (Second) of Agency § 265 states a general rule as follows:

> (1) A master or other principal is subject to liability for torts which result from reliance upon, or belief in, statements or other conduct within an agent's apparent authority.
>
> (2) Unless there has been reliance, the principal is not liable in tort for conduct of a servant or other agent merely because it is within his apparent authority or apparent scope of employment.

Section 267 provides as follows:

> One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

The Ciarochis rely upon the just-quoted sections as the bases for their claim that BSA and Southeast Council are

vicariously liable for Sinclair's torts because he was their apparent agent. In this regard, a comment to and an illustration of § 267 are relevant:

> The rules stated in sections 228-237, stating what acts are within the scope of employment, apply. Thus, except in the case of misrepresentations, a purported master ordinarily is not liable for conduct of an apparent servant not actuated in some measure by an intent to perform the service in which he is apparently engaged.

Id. comment b.

> P, a department store, contracts with T as an independent contractor, to give medical attention to patrons of the store, T appearing as an employee. For the purpose of robbery, T hits on the head a patron seeking medical attention. P is no more liable than he would be if T were his servant.

Section 267, illustration 3.

The just-quoted comment incorporates *Restatement (Second) of Agency* §§ 228, 229, and 235. Section 228(1) describes four circumstances that *must* exist if the conduct of an agent is to be deemed within the scope of authority.[2] The conduct must be of the same kind as that authorized; the conduct must occur at approximately the authorized time and place; the conduct must be "actuated, at least in party, by a purpose to serve the master;" and any force that is used must not be unexpectable by the master. Section 228(2) states the converse of the minimum requirements set out in § 228(1):

> Conduct of a servant is not within the scope of employment if it is different in kind from that au-

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[2] In Alaska, the circumstances described in § 228(1) are relevant considerations only, not prerequisites. Jane Doe v. Samaritan Counseling Center, 791 P.2d 344, 347 (Alaska 1990). However, that clarification of the applicable rule does not change the outcome in this case given significant factual differences. *See infra* at 10-11.

> thorized, far beyond the authorized time or space limitations, *or* too little actuated by a purpose to serve the master.

Section 228(2) (emphasis added).

The immediately following section, § 229, sets out a number of "matters of fact" that may be considered by the court in applying § 228. Those matters that appear to be relevant to the case at bar include:

> (a) whether or not the act is one commonly done by such servants;
>
> * * * *
>
> (e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;
>
> (f) whether or not the master has reason to expect that such an act will be done;
>
> (g) the similarity in quality of the act done to the act authorized;
>
> * * * *
>
> (i) the extent of departure from the normal method of accomplishing an authorized result; and
>
> (j) whether or not the act is seriously criminal.

Section 229.

Section 235 also bears on this analysis. It provides:

> An act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed.

Comment to a § 235 notes that "[c]onduct is within the scope of employment only if the servant is actuated to some extent by an intent to serve his master." Comment c to the section is also instructive:

> The fact that an act is done in an outrageous or abnormal manner has value in indicating that the servant is not actuated by an intent to perform the employer's business. *See* comment b on § 229 and § 245. In such cases, the facts may indicate that the servant is merely using the opportunity afforded by the circumstances to do the harm. Hence, unless the principal has violated a personal duty to the person injured, or unless he becomes liable because of the nature of the instrumentality entrusted to the servant (*See* §§ 212-214), he is not liable for such acts.

Section 235 comment c.

The court also relies on § 245, which "states the special rule which applies when a servant intentionally uses force against another person." Section 228 comment a. Section 245 provides:

> A master is subject to liability for the intended tortious harm by a servant to the person or things of another by an act done in connection with the servant's employment, although the act was unauthorized, if the act was not unexpectable in view of the duties of the servant.

Comment a to § 245 is especially helpful in elucidating the proper analysis:

> In all of these situations the liability of the principal depends fundamentally upon the likelihood of a battery or other tort in view of the kind of result to be accomplished, the customs of the enterprise and the nature of the persons normally employed for doing the work. Thus, one who is sent to collect a bill does not normally make the employer responsible if he seizes money from the debtor, since this would be an unusual and unexpectable proceeding of a bill collector. On the other hand, one who is sent to recapture property is likely to come into contact with a possessor unwilling to surrender it, and persons

> sent to recapture goods are frequently of the kind who would be not unlikely to attempt force. Clearly the custodian of property is expected to use force to protect it from others seeking to gain possession, and the physical contact involved in the retention of possession is something which can clearly be anticipated. Again, whether or not it is within the scope of employment of a teller in a bank to interfere in a fight between two customers, it normally is within the scope of employment of an employee of a tavern to interfere in the fighting of two inebriants. In the later case, as also where a custodian is protecting property, the master is responsible for the use of somewhat more than the appropriate amount of force.

The analysis that is distilled from §§ 228, 229, 235 and 245 is precisely the analysis followed by the court in *Williams v. Alyeska Pipeline Service Company,* 650 P.2d 343, 348-351 (Alaska 1982). In that case, a bus driver employed by a subcontractor on a pipeline construction project sued a union and its steward for injuries received when he was beaten by a group of union members. In considering the union's claim that it could not be liable since the steward acted outside the scope of his union duties, the court applied §§ 228 and 245. The court reasoned that union stewards are authorized to take grievances to the employer on behalf of union members, that they are authorized to gather union members together to seek a redress of grievances, that labor-management relations are sometimes tense, even confrontational, and that it was not unexpectable that a union steward might use a threat of force in representing union members. On these bases, the supreme court concluded that the trial court was clearly erroneous in concluding that the union steward was acting outside the scope of his agency.

In a proposed draft of this memorandum of decision circulated to the parties for objections, the court did not

discuss *Jane Doe v. Samaritan Counselling Center*, 791 P.2d 344 (Alaska 1990) believing it to be readily distinguishable and therefore not controlling. However, at p.3 of their response to the court's memorandum of decision, the Ciarochis make a foreseeability argument that merits discusion after the facts of the case are described briefly.

Jane Doe visited the Samaritan Counseling Center for emotional and spiritual counseling. Kissing and fondling allegedly occurred during two or her counselling sessions with Reverend-Dr. John Garvin. At a later time, after Doe had cancelled her counselling sessions with Garvin, the two allegedly met and had sexual intercourse. A key aspect of *Doe* was evidence in the record that Garvin mishandled "transference phenomenon", a parent-dependent relationship which develops during counselling. The court quoted with apparent approval the analysis of another court to the effect that "the centrality of transference to therapy renders it impossible to separate an abuse of transference from the treatment itself." 791 P.2d at 348. The court in *Doe* concluded:

> Given the transference phenomenon that is alleged to have occurred in this case, we hold that it could reasonably be concluded that the resulting sexual conduct was "incidental" to the therapy.

Id.

The Ciarochis erroneously read into the supreme court's discussion in *Doe* at 347-48 a foreseeability test for respondeat superior liability that is indistinguishable from the foreseeability test in a negligence case. The courts and commentators appear to be unanimous that the two foreseeability concepts are quite different. *E.g.* 5 F. Harper, F. James, Jr., and O. Gray, *The Law of Torts* § 26.7 at 26-31 (2d ed. 1986) (hereinafter "*Harper*"); *Martinez v. Hagopian*, 227 Cal. Rptr. 763, 766 (Cal. App. 1986); *Rogers v. Kemper Construction Co.*, 124 Cal. Rptr. 143 (Cal. App. 1975). Indeed, our supreme

court in *Doe* identified *Ira S. Bushey and Sons v. U.S.*, 398 F.2d 167, 171-72 (2d Cir. 1968) as authority for the foreseeability test for respondeat superior liability, and the court in *Bushey* quoted *Harper* with approval on this point. Foreseeabiilty for purposes of respondeat superior liability was described in *Harper* at 27: "We are not here looking for the master's fault but rather for risks that may fairly be regarded as typical of or broadly incidental to the enterprise he has undertaken." That formulation is, of course, similar to the court's test in *Doe* at 348 where it defines as tortious conduct which "arises out of and is reasonably incidenal to the employee's legitimate work activities. . . ."

Given the frequency of the "transference phenomenon" in mental health counselling and resulting emotional involvements, it was at least arguable that the sexual relationship between Doe and Garvin was "foreseable," *i.e.* it "[arose] out of and [was] reasonably incidental to the employee's legitimate work activities. . . ." 791 P.2d at 348. The same cannot be said of the conduct of a middle-aged scoutmaster who sexually abuses a 10 year Cub Scout. While such abuses are not unheard of, they are indeed rare and, unlike the documented "transference phenomenon", they are not "reasonably incidental" to a scoutmaster's legitimate activities.

The case at bar is readily distinguishable from *Williams v. Alyeska Pipeline Service Company and Jane Doe v. Samaritan Counselling Center*; all of the undisputed facts in this case permit no reasonable dispute over the issue of whether Sinclair was acting within the scope of his actual or apparent authority. Virtually all of the courts that have ruled on cases involving physical and sexual assault by caretakers on persons within their care have held that such assaults are not within the scope of their actual or apparent authority. *E.g. John R. v. Oakland Unified School District*, 769 P.2d 948 (Cal. 1989); *Cordts v. Boy Scouts of America, Inc.*, 252 Cal. Rptr. 629, 632-33 (Cal. App. 1988); *Bozarth v. Harper Creek*

Board of Education, 288 N.W. 2d 424, 426 (Mich. App. 1979); *Dunn v. Garcia*, 768 P.2d 419, 421 (Or. App. 1989). Therefore, BSA and Southeast Council will have partial summary judgment on the Ciarochis' apparent agency claim under *Restatement (Second) of Agency* §§ 265 and 267.

C. *Section 219 Liability*

The Ciarochis assert that BSA and Southeast Council are liable for Sinclair's tort under *Restatement (Second) of Agency* § 219(2)(d), clause 2:

> A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> * * * *
>
> (d) . . . he was aided in accomplishing the tort by the existence of the agency relation.

The Ciarochis maintain that Sinclair was able to commit the abuse only because of his position as Micky's scout leader, which position gave him access to Micky in groups and alone.

There is a question whether Sinclair was a "servant" of the other defendants, which status he must have had before liability may be imposed. *See generally Restatement (Second) of Agency* § 219, Introductory Note, pp. 478-480 (1958). On this basis alone, partial summary judgment to the Ciarochis should be denied. The discussion which follows bears on another aspect of both the Ciarochis' motion and the cross-motion regarding § 219(2)(d).

The clause of § 219(2)(d) upon which the Ciarochis rely is discussed in comment e to § 219:

> In other situations, the servant may be able to cause harm because of his position as agent, as where a telegraph operator sends false messages purporting

> to come from third persons. *See* § 261. Again, the manager of a store operated by him for an undisclosed principal is enabled to cheat the customers because of his position. *See* § 222.

The Ciarochis argue that "[c]omment e to § 219 makes clear that this exception goes beyond situations where the agent appeared to be acting within the scope of his authority." Reply to BSA's and Southeast Council's Opposition at 9. However, their quotation from comment e in their memorandum inexplicability ends immediately before the examples of the telegraph operator and the store manager are set out and reference is made to § 261, items which appear to belie the Ciarochis' claim that the agent need not appear to be acting within the scope of authority.

At the very least, to prove liability under § 219(2)(d), the Ciarochis must establish that the agency relationship provided Sinclair with the means to commit the tort and that Sinclair appeared to have been acting within the scope of his authority. To impose liability, it is not sufficient to prove only that the agency relationship gave Sinclair access to Micky or an opportunity to abuse Micky. *Restatement (Second) of Agency* § 219 comment e; *Bozarth v. Harper Creek Board of Education,* 288 NW 2d at 425-26. *See also Barnes v. Costle,* 561 F.2d 983, 995-96 (D.C. Cir. 1977) (MacKinnon, C.J., concurrring).

There are genuine issues of material fact that prevent partial summary judgment for the Ciarochis. In their motion, the Ciarochis have alleged facts that show nothing more than access and opportunity, a showing that does not entitle them to judgment as a matter of law. For their part, BSA and Southeast Council have established indisputably that the agency relationship did not afford Sinclair a means apparently within the scope of his authority to accomplish the sexual abuse of Micky.[3]

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[3] It at first appears arguable that a principal is liable for the tort of an agent if the tortious act appealed to the deceived, per-

Therefore, BSA and Southeast Council are entitled to partial summary judgment on the issue of liability under § 219(2)(d).[4]

D. *Section 261 Liability*

The Ciarochis next assert liability of BSA on the basis of *Restatement (Second) of Agency* § 261, which provides as follows:

> A principal who puts a servant or other agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud.

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haps incompetent victim to be within the scope of the agent's apparent authority. *E.g.* Bozarth v. Harper Creek Board of Education, 288 N.W. 2d 424, 425-26 (Mich. App. 1979) ("from the viewpoint of the person being harmed"). *See also* Restatement (Second) of Agency § 8 comment c. However, in the actual holdings, when it comes to sexual assaults at least, the courts appear to view the acts through the eyes of a legally competent adult. *See* Cordts v. Boy Scouts of America, Inc., 252 Cal. Rptr. 629, 632-33 (Cal. App. 1988) (sexual acts are outside the apparent authority of scoutmasters); McIntosh v. Becker, 314 N.W. 2d 728, 732, 735 (Mich. App. 1981) (no factfinder could conclude that racial and sexual slurs were within apparent authority; but factfinder could conclude that child thought teacher had apparent authority to call him "dumb," "immature," and "helpless"); *and* Bozarth, 288 N.W. 2d at 426 (sexual acts are outside the apparent authority of teachers).

[4] The Ciarochis' reliance on White v. County of Orange, 212 Cal. Rptr. 493 (Cal. App. 1985) is unavailing. It is distinguishable by reason of the fact that the tort involved unlawful confinement and outrageous threats, conduct that, regrettably, comes within the scope of employment of police officers, as that scope is defined in the law of agency. *Cf.* Williams v. Alyeska Pipeline Service Co., 650 P.2d 343 (coercive and assaultive conduct is within the scope of authority of a union steward despite the goal of collective bargaining to preserve industrial peace). Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554 (11th Cir. 1987) is distinguishable for analogous reasons.

The Ciarochis claim that BSA placed Sinclair in a position which allowed him to commit the sexual assault of Micky by deceiving him.

Besides the scope of authority issue that has already been addressed, the issue that immediately presents itself to the court is whether "fraud" refers to deception that leads to *any* harm or only to deception that leads to the loss of money or goods. In this regard, several features of the *Restatement* are instructive. First, the Reporter's Notes, comments to, and illustrations of § 261 appear to contemplate its application in *commercial* contexts. Second, *Restatement of (Second) of Agency* § 219 comment e implies a distinction between "an action of deceit (§§ 257-264)" and one for "physical harm. *See* §§ 265-267."

Third, an examination of the approximately 125 cases digested under § 261 reveals only three cases that did not involve commercial fraud. Two of those cases are inapposite: *Bozarth v. Harper Creek Board of Education*, 288 NW 2d at 426 n.2 made the briefest reference to § 261 but neither applied it nor analyzed it. The second case, *Ira S. Bushey and Sons, Inc. v. United States*, 276 F. Sup. 518, 530 (E.D.N.Y. 1967) made only passing reference to § 261 while holding the United States liable for damage to a dry dock caused by an intoxicated Coast Guard seaman returning to his quarters aboard a Coast Guard vessel then in dry dock.

The only case known to the court in which liability for an assault was premised on § 261 is *Bowman v. Home Life Insurance Company of America*, 243 F.2d 331 (3rd Cir. 1957). In *Bowman*, an insurance company field underwriter, with the plaintiff's life insurance application in hand, went to the plaintiff's home and posed as the physician of the insurance company. By that ruse, he convinced the female applicant and her daughter to submit physical examinations. The court's analysis of the applicability of § 261 was brief: "The fact that his fraud

took the form of a tortious touching instead of a tortious securing of money from the victim is, we think, not important." 243 F.2d at 334.

This court finds the *Bowman* court's "analysis" unpersuasive. This court believes that the *Bowman* court applied § 261 as if it were a rule of decision. In fact, § 261 merely "restates" the rule of decision articulated by courts in scores of decisions, virtually all of which involved *commercial* transactions. Moreover, one *ratio decidendi* of these cases is that, in certain situations, the burden of a loss should be imposed upon commercial principals, who are often better able to bear such losses as a cost of doing business, rather than upon innocent victims, who are often people of few means. W. Prosser and W. Keeton, *The Law of Torts*, § 69, pp. 500-501 (1984). The case at bar simply does not fit that paradigm.

Therefore, the Ciarochis' motion for partial summary judgment on § 261 liability will be denied and the motion for partial summary judgment in favor of BSA and Southeast Council will be granted.

E. *Vicarious Liability: Policy Considerations*

In its decision in *John R. v. Oakland Unified School District*, 769 P.2d 948 (Cal. 1989), the California Supreme Court completely by-passed the formulaic analysis just set out by this court:

> But although the facts of this case *can* be made to fit a version of the respondeat superior doctrine, we are unpersuaded that they *should* be or that the doctrine is approximately invoked here. We draw our decision not from the various factual scenarios in which vicarious liability has or has not been imposed on employers for the torts of their employees, but instead from the underlying rationale for the respondeat superior doctrine.

769 P.2d at 955 (emphasis in original). The court went on to articulate three reasons why vicarious liability might be imposed on an enterprise for harms incident to the enterprise. First, the imposition of liability might encourage the principal to take steps to prevent harm. Second, the imposition of liability on the principal might create a greater likelihood that the victim would be able to recover damages for the harm suffered, which might not occur if the victim had to look only to the impecunious tortfeasor. Third, the imposition of liability on the enterprise might broadly and equitably distribute losses among the beneficiaries of the enterprise. While this court agrees that an examination of the fundamental policies underlying vicarious liability is essential to the correct resolution of the case, it believes that an inquiry somewhat broader in scope and detail than the inquiry in *John R.* is necessary.

In recent years, a number of commentators have analyzed the merits and demerits of the imposition of vicarious liability on enterprises for the torts of their agents. *E.g.* Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents,* 70 Cal. L. Rev. 1345 (1982) (hereinafter "*Kornhauser*"); Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines,* 101 Harv. L. Rev. 563 (1988) (hereinafter "*Sykes*"). While the articles just cited focus on economic enterprises, they, the *John R.* decision, and other authorities identify considerations that are applicable to the formulation of a liability rule in the context of this case.

First, the court must identify, if it can, which rule of liability serves best to deter wrongdoing by agents. In this regard, the financial solvency of the agent may be an important consideration. A solvent agent may be deterred by a liability rule that imposes liability on the agent and

not on the enterprise, while that agent will not be deterred by a vicarious liability rule unless the enterprise, to protect itself, provides incentives to good conduct or can otherwise enforce standards of conduct with relative ease. On the other hand, a wholly or partially insolvent agent, as many will be or become in cases of sexual abuse (by reason of high legal fees for their civil and criminal defenses and high awards), will not be more deterred by a rule of agent liability as against a rule of vicarious liability.

The principal deterrent ot sexual abuse is the criminal penalty that attends conviction of the crime of sexual abuse of a minor, an eight year mandatory sentence if there is sexual penetration. AS 12.545.125(i). Economic disincentives (threatened demotions, terminations) are unlikely to be effective to deter pedophiles or will have an effectiveness that is overshadowed by the deterrent effect of criminal penalties. Thus, neither a rule of agent liability nor a rule of vicarious liability enhances deterrance of pedophilia by agents.

A second consideration is whether the choice of a liability rule would serve to encourage greater care by the enterprise. It is clear that some form of liability (strict vicarious liability or liability based on the negligent hire or supervision of the abuser) *will* encourage more care by the enterprise than a rule of agent liability. However, as noted below, strict vicarious liability is probably ineffective to foster any greater care posthire than liability based on negligence since the compliance of the agent is extremely hard to monitor; beyond the care the enterprise might take in hiring the agent, there is little more the enterprise can do to monitor the agent's performance in the social service context absent fundamental changes in the nature of the enterprise.

It is difficult if not impossible for an enterprise to structure inducements and precautions to deter sexually inappropriate conduct toward children. While a business

enterprise and its employees might foresee a physical altercation or a safety violation on the shop floor and negotiate mea to deal with it, including inspections, procedures, risk sharing, and personnel actions, the sexual abuse of children by caregivers is rarely foreseen and is always surreptitious. Conventional incentives and disincentives used by enterprises simply do not work to deter compulsive sexual misconduct.

A third consideration is the cost to the enterprise of the steps it might take to reduce the incidents of harm. The incidence of some harm might be reduced by relatively inexpensive precautions; this is particularly so in the case of observable safety and conduct violations. To reduce the incidence of child sexual abuse in connection with social service enterprises, those enterprises would have to select agents more carefully, a feasible task, and/or monitor their conduct more carefully post-appointment a problematic undertaking.

Post-appointment monitoring would entail a fundamental restructuring of the scouting enterprise to, for example, provide for a team approach to the provision of services and/or provide for independent monitors. The personal interaction between individual scouts and individual leaders would be reduced or eliminated. The reach of the program would be curtailed and/or the cost of services would be increased. In a profit-seeking enterprise, it may be socially optimal to impose the cost of liability judgments for agents' torts on the enterprise to prevent excess profits or excess production. *Sykes* at 567. However, that point is inapplicable in the case of the social service enterprise at bar since the demand for those services far exceeds the supply. Imposing liability on the enterprise would not restrain excess profits or excess production; it would restrain only beneficial youth services.

One commentator has noted

> Pecuniary responsibility forces [government] employees to choose between protecting their own purses

> and executing the programs of their employers with zeal and imagination.

Baxter, *Enterprise Liability, Public and Private*, 42 Law and Contemp. Probs. 45, 49 (1978). That observation concerned the imposition of personal liability on government officials, but it applies as well to the imposition of vicarious liability on social service organizations. If an enterprise, which may serve thousands or millions of people through hundreds or thousands of agents, were forced to bear liability for a relative few abusive agents, the enterprise would be forced to curtail the quantity and/or quality of services to reduce that exposure.

Yet another consideration in selecting a rule of liability is the extent to which the rule selected takes advantage of the arbiter's ability to affix responsibility. One justification for imposing vicarious liability on an enterprise is that the enterprise is better able than a court to identify the responsible person or persons and exact a remedy (through its personnel system or an indemnity action) when harm results from the actions of several of its agents. However, sexual abuse of a mior does not fit that mold since it typically involves a *single* tort feasor acting secretly and far from the premises of the enterprise. As such, the enterprise would have no advantage over a court in determining whether abuse occurred and at whose hands.

The preceding paragraphs demonstrate that strict vicarious liability offers little (by way of deterrence of agent wrongdoing, encouragement of precaution by enterprise, or enhancement of the ability to affix responsibility) over either agent liability or liability based on negligence. The only advantage of strict vicarious liability is its heightened assurance that victims will receive compensation for their suffering from an entity that is able to spread the risk and cost among thousands or millions of consumers of the entity's services.

As indicated previously, the assurance of compensation is not without a social cost:

> [O]ne would expect lower prices and higher output under agent liability because the cost of doing business would be less. If the market for the principal's product or service were competitive, benefits to the principal of agent liability would be passed on to consumers. Victims would transfer an amount equal to the unfunded liability to consumers.

Kornhauser at 1365. In effect, the compensation that a victim does not receive from an insolvent wrongdoer in an agent liability jurisdiction passes to other consumers of the services of the enterprise, assuming that the system is a competitive one in which the savings to the enterprise is not diverted into increased salaries or socially subpotimal enterprise activities.

In the context of charitable social service enterprises staffed in substantial part by volunteers, the use to which the savings is put is crucial to the selection of a liability rule. Even with the abolition of charitable immunity in most jurisdictions, there remain differences in liability rules applicable to those engaged in truly charitable pursuits and those engaged in personal or business pursuits. *E.g. Restatement (Second) of Trusts* § 402 comment b. The reasons are apparent: unlike a profit-seeking enterprise and its customers, a charitable social service enterprise does not profit from the activities that somehow facilitated the harm, and the recipients of the services of the enterprise are blameless and in need of services which society deems to be socially beneficial without regard to market considerations. Put another way, the victim can be compensated by the social service enterprise only at a cost of the reduction or elimination of services to scores, hundreds, or even thousands of deserving social service recipients. That fact distinguishes this case fundamentally from a case involving a business enterprise upon which vicarious liability might otherwise be imposed.

There being few advantages and unquestionable costs to the imposition of strict vicarious liability on BSA and Southeast Council, the court holds that they cannot be strictly vicariously liable for any harm caused to Micky by Sinclair.

III. CONCLUSIONS AND ORDER

For the above-stated reasons,

IT IS ORDERED that:

1. The Ciarochis' motion for partial summary judgment on liability under *Restatement (Second) of Agency* §§ 219(2)(d), 261, 265, and 267 is denied.

2. BSA's and Southeast Council's cross-motion for partial summary judgment on liability under *Restatement (Second) of Agency* §§ 219(2)(d), 261, 265, and 267 is granted.

3. BSA's and Southeast Council's cross-motion for partial summary judgment on liability under the doctrine of strict vicarious liability is granted.

DATED at Ketchigan, Alaska this 6th day of August, 1990.

/s/ Thomas M. Jahnke
THOMAS M. JAHNKE
Superior Court Judge

APPENDIX I

IN THE SUPREME COURT
OF THE STATE OF ALASKA

Supreme Court No. S-4112

Trial Court No. 1KE 89-42 Civil

DAVID ("MICKY") CIAROCHI, *et al.*,
Petitioners,

v.

THE BOY SCOUTS OF AMERICA, INC.,
Respondents.

Before: Rabinowitz, Burke, Compton and Moore
Justices.
[Matthews, Chief Justice, not participating.]

ORDER

On consideration of the petition for review, filed on August 16, 1990, and the response to the petition, filed on August 24, 1990,

IT IS ORDERED:

The petition for review is denied.

Entered by direction of the court at Anchorage, Alaska on September 25, 1990.

/s/ David A. Lampen
DAVID A. LAMPEN, SR.
Clerk of the Supreme Court